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THE USE OF AFTER-ACQUIRED EVIDENCE IN EMPLOYMENT DISCRIMINATION CASES

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Lately, in the field of employment law, there has been a growing trend by employers attempting to defend discrimination suits with evidence or justifications acquired after the alleged discriminatory conduct and after the employee has filed suit. Thus far, the courts are unwilling to consider such evidence on the issue of liability, but there is no clear consensus as to the relevance of such after-acquired evidence on damages. This Article examines federal cases which have discussed the impact of after-acquired evidence on the issues of liability and damages; and then proposes standards for the use of such after-acquired evidence.

I. THE APPLICATION OF AFTER-ACQUIRED EVIDENCE TO THE ISSUE OF LIABILITY

In employment discrimination cases, a plaintiff may establish liability either by showing direct evidence of discrimination, or by producing evidence which creates an inference of discrimination. Under either approach, there is a strong argument against using after-acquired evidence at the liability stage.

A. The Mixed-Motive Cases

In *Mount Healthy City Board of Education v. Doyle*,[1] an employee was terminated, in part, for legitimate reasons and, in part, for engaging in constitutionally protected conduct. The plaintiff was a teacher for the defendant. During his employment, Mr. Doyle was involved in several negative incidents which were known to his employer. First, he had argued with another teacher, which resulted in the other teacher slapping him.[2] After-

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[1] 429 U.S. 274 (1977).

[2] *Id.* at 281.

wards he refused to accept an apology from the other teacher and insisted that the other teacher be punished.[3] On another occasion, Mr. Doyle started an argument with members of the cafeteria staff over the amount of food served to him.[4] Later, he referred to students as "sons of bitches" in connection with a disciplinary complaint.[5] On another occasion, while acting as cafeteria supervisor, he made obscene gestures at two girls because they failed to follow his orders.[6] Finally, after the school principal had circulated a memorandum to staff members concerning the dress and appearance of faculty members, Mr. Doyle disclosed the memorandum to a radio disc jockey, who in turn, broadcasted the contents of the memorandum over the radio.[7] Mr. Doyle later apologized for this incident.

Approximately one month after the radio station incident, the superintendent made his routine annual recommendations to the school board as to which faculty members should be rehired. The superintendent recommended that Mr. Doyle, as well as nine other faculty members, not be rehired.[8] This recommendation was adopted by the board. The reason given for not renewing Mr. Doyle's contract was that he demonstrated "a notable lack of tact in handling professional matters which leaves much doubt as to [his] sincerity in establishing good school relationships."[9] In support of this conclusion, the superintendent cited the incidents involving the radio station and the obscene gestures.[10]

The district court held that Mr. Doyle's conduct with respect to the radio station was clearly protected by the First Amendment, and because this protected conduct played a substantial part in the decision not to renew his contract, he was entitled to reinstatement and back pay.[11] Additionally, the district court found a legitimate reason, independent of the First Amendment issue, for the termination, specifically the obscene gestures made to the cafeteria workers.[12]

[3] *Id.*
[4] *Id.*
[5] *Id.* at 282.
[6] Mount Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 282 (1977).
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.* at 283.
[11] *Mount Healthy*, 429 U.S. at 283.
[12] *Id.* at 285.

The Supreme Court found that the employer not only could have, but in fact, would have reached the same decision without considering the constitutionally protected conduct.[13] The Court held:

> A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident *is inevitably on the minds of those responsible for the decision to rehire, and does indeed* play a part in that decision, even if the same decision would have been reached had the incident not occurred. *The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct.*[14]

Thus, a defendant employer should have the opportunity to show by a preponderance of the evidence that it would have reached the same decision in the absence of the protected conduct.[15] However, the language in *Mount Healthy* suggests that the employer, in attempting to prove that the same decision would have been reached absent the illegitimate reason, must base its proof on information which was on the minds of the decision-makers and which did indeed play a part in the decision.

Thereafter, in *Price Waterhouse v. Hopkins*,[16] the United States Supreme Court made it clear that, in mixed motive cases,[17] the question of whether the employer would have made the same decision absent the discrimination is to be answered based on the information known by the employer at the time of its decision. The Court stated that "proving that the same decision would have been justified . . . is not the same thing as proving that the same decision would have been made."[18] "An employer may not, in other

[13] *Id.*
[14] *Id.* at 285-86 (emphasis added).
[15] *Id.* at 287.
[16] 490 U.S. 228 (1989) (plurality opinion).
[17] *Id.* at 248. A mixed-motive case is one in which the defendant's decision to terminate, or otherwise discipline the plaintiff, involves a mixture of legitimate and illegitimate reasons. *Id.*
[18] *Id.* at 252 (quoting Ayers v. Western Line Consol. Sch. Dist., 555 F.2d 1309, 1315 (5th

words, prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it *at the time* of the decision."[19]

Under the principles enunciated in *Mount Healthy* and *Price Waterhouse*, an employer who discriminatorily terminates an individual, but later discovers a legitimate reason for the termination, could not have been motivated by the legitimate factor.[20] The Supreme Court's ruling in *Price Waterhouse* clearly requires the motivating factor to exist at the time of the decision.

B. The Cases Involving Indirect Evidence of Discrimination

A plaintiff may indirectly establish a prima facie case of discrimination by way of the *McDonnell Douglas* shifting burdens analysis.[21] Under this analysis, the plaintiff has the initial burden of proving a prima facie case of discrimination. The burden then shifts to the defendant to articulate a legitimate nondiscriminatory reason for its action.[22] In so doing, the defendant's reasons must be clear and reasonably specific.[23] If the defendant is able to articulate a nondiscriminatory reason, the burden then shifts back to the plaintiff to present evidence that tends to show that the defendant's articulated reason is pretextual.[24]

Under the *McDonnell Douglas* analysis, the issue of after-acquired evidence often will arise when the defendant attempts to articulate a nondiscriminatory reason for its conduct. The reason, however, "must be tested against facts known to the defendant at the time of its action. Post hoc rationalizations, however persuasive, will not suffice."[25] Because reasons based on after-acquired evidence could not have existed in the mind of the decision-maker at the time of the decision, it cannot be inferred that such an ar-

Cir. 1977), *vacated*, 439 U.S. 410 (1979)).

[19] *Price Waterhouse*, 490 U.S. at 252 (emphasis added), *discussed and followed in* Ostrowski v. Atlantic Mut. Ins. Co., 968 F.2d 171, 182-83 (2d Cir. 1992).

[20] EEOC v. Alton Packaging, 901 F.2d 920, 925 (11th Cir. 1990); Hill v. Seaboard Coastline R.R., 767 F.2d 771, 774 (11th Cir. 1985).

[21] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[22] *Id.* at 802.

[23] *Id.*; *see also* Diamantopulos v. Brookside Corp., 683 F. Supp. 322, 327 (D. Conn. 1988) (stating that "vague or conclusory statements or reasons are insufficient . . . the reasons must be clear and specific.").

[24] *McDonnell Douglas*, 411 U.S. at 802.

[25] Alexander v. Local 496, Laborers Intern., 776 F. Supp. 1401, 1419 (D. Ohio 1991); *see also* Williams v. TWA, 660 F.2d 1267, 1271 (8th Cir. 1981).

ticulated reason actually motivated the defendant.[26]

C. *The Cases Refusing to Consider After-Acquired Evidence on the Issue of Liability*

An examination of the case law demonstrates that the majority of courts have upheld these principles and refused to consider after-acquired evidence when determining liability.[27] For instance, in *Norris v. City of San Francisco*,[28] the plaintiff brought a race-discrimination suit based on the defendants' failure to hire him. In their attempts to justify plaintiff's rejection, the defendants' explanations shifted during the course of litigation. The district court observed at trial, "the reasons you gave [the EEOC investigator] for . . . not filling the position are totally different from the reasons you're now stating."[29] Despite this shift in explanations, however, the district court accepted the defendants' explanation and found no discrimination. On appeal, the Ninth Circuit reversed:

> Clearly, information about [the plaintiff] which was unknown to [defendant] at the time the decision was made could not have entered into the calculus of the decision and would be entirely irrelevant. Such after-acquired data cannot explain the [defendant's] decision not to hire him. The issue to be resolved is whether [the plaintiff's] rejection, when it occurred, was then actually motivated by illegal discrimination, not whether the [defendant] could thereafter articulate some hypothetical non-discriminatory reason for its decision. In determining whether the [defendant's] articulated rationale is pretextual, the district court must weigh and resolve not only what information was known to the [defendant] at the time, but also the plausibility of its explanations in light of all the evidence and the inconsistency of these explanations over time.[30]

Similar reasoning was applied by the United States District Court

[26] *See* Harris v. Birmingham Bd. of Educ., 712 F.2d 1377, 1383 (11th Cir. 1983); Lanphear v. Prokop, 703 F.2d 1311, 1316 (D.C. Cir. 1983).

[27] These courts have done so under both the *McDonnell Douglas* and *Price Waterhouse* schemes. *See, e.g.*, Sabree v. United Bhd. of Carpenters and Joiners, 921 F.2d 396, 404 (1st Cir. 1990) ("*Price Waterhouse*'s directive to essentially take a snapshot at the moment of the allegedly discriminatory act is applicable to all Title VII claims.").

[28] 900 F.2d 1326 (9th Cir. 1990).

[29] *Id.* at 1330.

[30] *Id.* at 1331 (citations omitted).

for the Western District of Pennsylvania in *Garland v. U.S. Air, Inc.*[31]

In *EEOC v. Alton Packaging*,[32] the plaintiff brought suit against his employer alleging a discriminatory failure to promote. The defendant employer attempted to justify the refusal to promote by producing evidence that after the plaintiff was denied a promotion, a candidate with better qualifications applied for and received the promotion. The court held that although the plaintiff was less qualified than the person selected, this could not have been a motivating factor for the employer's failure to promote because the selected applicant's qualifications were not known by the employer at the time of the decision to deny plaintiff's promotion.[33]

Similarly, in *Thorne v. El Segundo*,[34] plaintiff brought suit for discriminatory failure to hire. As a legitimate nondiscriminatory reason for the refusal to hire, the employer claimed that it would not have hired plaintiff based on his past-attendance record. The court found that the plaintiff's attendance records were not available, let alone considered by the employer at the time of the decision.[35] As a result, the employer's reason was held to be unworthy of credence and pretextual.[36]

In *Smith v. Equitable Life Assurance Society*,[37] the plaintiff brought suit under Title VII alleging a discriminatory refusal to

[31] 767 F. Supp. 715, 725 (D. Pa. 1991). The defendant gave different justifications to the EEOC, in response to plaintiff's request for admission, and in the pretrial statement to the court. *Id.* The court stated that "[r]easons which are first articulated after the initiation of the lawsuit are suspect and considered by the court to be self-serving." *Id.*

[32] 901 F.2d 920 (11th Cir. 1990).

[33] *Id.* at 925; *see also* Hill v. Seaboard C.L.R. Co., 767 F.2d 771, 774 (11th Cir. 1985). Although failure to promote an employee because the person actually promoted is more qualified is a nondiscriminatory reason, the defendant's decision could not have been based upon the candidates' qualifications because they were not known at that time. *Id.*; Joshi v. Florida State Univ. Health Ctr., 763 F.2d 1227, 1235 (11th Cir.) (where female applicant's qualifications were never compared with male applicant's qualifications, their relative qualifications could not have been reason for not hiring female applicant), *cert. denied*, 474 U.S. 948 (1985); Eastland v. Tennessee Valley Auth., 704 F.2d 613, 626 (11th Cir. 1983) (holding that in failure to hire case, defendant cannot assert, as nondiscriminatory reason, that person actually hired was better qualified than plaintiff if qualifications of person actually hired were not known at time decision not to hire plaintiff was made), *cert. denied*, 456 U.S. 1066 (1984).

[34] 726 F.2d 459 (9th Cir. 1983).

[35] *Id.* at 467-68.

[36] *Id.* at 468; *see also* DeMarco v. Holy Cross High Sch., 4 F.3d 166, 171 (2d Cir. 1993) (stating that plaintiff, in discrimination suit, may prove pretext by showing that employer's nondiscriminatory reason was first articulated only after allegation of discrimination).

[37] 60 Fair Empl. Prac. Cas. (BNA) 1225 (S.D.N.Y. 1993).

promote, retaliation, and harassment. During discovery, the employer learned that, during the course of her employment, the plaintiff had falsified her group-insurance application and an insurance claim. Based on this after-acquired evidence, the employer moved for summary judgment on all counts, arguing that had it learned of the misconduct during plaintiff's employment, plaintiff would have been fired immediately. Denying summary judgment on this basis, the court stated:

> Because defendants first discovered plaintiff's misconduct during her pretrial deposition, but were not aware of it when she was employed by them, the Court finds that Plaintiff's falsification of her insurance application has little relevance on this motion. *McDonnell Douglas*, which sets forth the shifting burdens in a Title VII case, clearly presupposes a "legitimate, non-discriminatory reason" *known* to the employer at the time of the employee's discharge. While the jury may consider such information in assessing plaintiff's damages, if any, the Court finds this information irrelevant in assessing the reasons defendants had in 1990 for discharging Plaintiff.[38]

The court, however, granted summary judgment on other grounds.

II. The Effect of After-Acquired Evidence on Damages

A. *The Cases Considering After-Acquired Evidence on the Issue of Damages*

1. The Cases Holding that After-Acquired Evidence Precludes the Employee from Recovering Any Damages

Although courts have been reluctant to consider after-acquired evidence on the issue of liability,[39] courts have been more willing

[38] *Id.* at 1227 (emphasis added).

[39] *See* Kristufek v. Hussman Foodservice Co., 985 F.2d 364, 369 (7th Cir. 1993) ("A discriminatory firing must be decided solely with respect to the known circumstances leading to the discharge."); *see also* Jolly v. Northern Telecom, Inc., 766 F. Supp. 480, 494 (D. Va. 1991). The defendant's shifting explanations and inconsistent stories caused the court to state: "defendant's various personnel told so many stories, so totally inconsistent with each other, that they had lost all credibility by the conclusion of the proceedings. Put simply, [defendant] took more positions than a gymnast on a trampoline." *Id.*; Townsend v. Washington Metro. Area Transit Auth., 746 F. Supp. 178, 186 (D.D.C. 1990). The defendant, at trial, gave a point-by-point comparison of plaintiff's qualifications versus those of the person who received the promotion. *Id.* Recognizing that the employer did no such comparison when it made the decision to deny plaintiff his promotion, the court stated that an em-

to consider after-acquired evidence on the issue of damages. In so doing, these courts have relied on the theory that if the employer can show that it would never have hired the employee or would have terminated the employee had it known of the after-acquired evidence, then the employee has sustained no damage as a result of the discriminatory termination.

For example, in *Summers v. State Farm Mutual Auto Insurance Co.*,[40] the plaintiff brought suit for wrongful termination based on age and religion. Prior to his termination, the plaintiff had been placed on probation for falsifying company records and was warned that future falsifications would lead to his discharge.[41] However, at the time of plaintiff's termination, he was told by company officials that he was not being fired for falsification of records but rather he was being fired because of his poor attitude, his inability to get along with coworkers, and for his similar problems in dealing with the public. Four years after the termination, the defendant learned that the plaintiff had falsified more than 150 company documents.[42] Based on this after-acquired evidence, the defendant moved for summary judgment. Granting summary judgment, the Tenth Circuit made clear that the after-acquired evidence did not relate to the *McDonnell Douglas* analysis, nor did the evidence relate to the reasons for the plaintiff's discharge.[43] Instead, the court relied, in part, on the *Mount Healthy* decision, and held that the evidence showed that the plaintiff sustained no injury from the allegedly discriminatory termination.[44] The court stated:

> To argue, as Summers does, that this after-acquired evidence should be ignored, is utterly unrealistic. The present case is

ployer's post hac rationale for discrimination "carries the seeds of its own destruction." *Id.* *But see* Johnson v. Honeywell Infor. Sys., 955 F.2d 409 (6th Cir. 1992). After the plaintiff's termination, the defendant learned that plaintiff misrepresented her lack of a college degree by responding to a job advertisement that specifically required a college degree. *Id.* at 414. The federal court, applying Michigan state law in diversity, concluded that Michigan's highest court would allow after-acquired evidence to be considered on the issue of liability. *Id.*; Sweeney v. U-Haul Co., 55 Empl. Prac. Dec. (CCH) ¶ 40,598 (N.D. Ill. 1991). Plaintiff was unable to show that the defendant's reason for terminating him was pretextual where the defendant learned that plaintiff's job application contained eleven misrepresentations regarding the reason for previous dismissals from employment. *Id.*

[40] 864 F.2d 700 (10th Cir. 1988).

[41] *Id.* at 702.

[42] *Id.* at 703.

[43] *Id.* at 704-05.

[44] *Id.* at 708.

> akin to the hypothetical wherein a company doctor is fired because of his age, race, religion and sex and the company, in defending a civil rights action, thereafter discovers that the discharged employee was not a "doctor." In our view, the masquerading doctor would be entitled to no relief, and Summers is in no better position.[45]

In granting summary judgment, the *Summers* court assumed that the defendant was motivated, at least in part, if not substantially, by plaintiff's age and religion.[46]

The Tenth Circuit's decision in *Summers*, allowing an employer to use after-acquired evidence to prove that the same decision would have been reached, appears to be at odds with *Mount Healthy* as refined by *Price Waterhouse*.[47] *Summers* relied on the language in *Mount Healthy* stating that a plaintiff "ought not to be able, by engaging in [protected] conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of the decision."[48] However, the *Mount Healthy* court clearly made this statement in light of evidence that was known to the employer at the time of the termination decision and actually considered. In *Mount Healthy*, the protected conduct was the last incident in a string of incidents known and considered by the employer in making the decision.[49]

Despite its questionable legal foundation, *Summers* has been followed by a number of courts, including the Sixth Circuit. In *Milligan-Jensen v. Michigan Technological University*,[50] a plaintiff brought suit for sex discrimination and retaliation. During the course of litigation, the employer learned that the plaintiff had lied on her job application by not disclosing a criminal conviction for driving under the influence of alcohol. The trial court found direct evidence of discrimination and rendered a plaintiff's verdict. The court, however, held that the employer would have fired

[45] Summers v. State Farm Mut. Auto Ins. Co., 864 F.2d 700, 708 (10th Cir. 1988).
[46] *Id.*
[47] The Tenth Circuit decided *Summers* before the United States Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion).
[48] *Summers*, 864 F.2d at 706 (quoting Mount Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 286 (1977)).
[49] *Mount Healthy*, 429 U.S. at 282-83.
[50] 975 F.2d 302 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 2991, *cert. dismissed*, 114 S. Ct. 22 (1993).

the plaintiff had it known about the falsified job application. As a result, the trial court randomly reduced plaintiff's damages by fifty percent.

On appeal, the Sixth Circuit reversed the trial court's decision and followed the Tenth Circuit's *Summers* analysis. The court held that the plaintiff suffered no injury from her discriminatory discharge because the trial court found that the employer would have terminated her had it known about the falsified application. Applying the *Summers* analysis, the Sixth Circuit stated that if the plaintiff would have been fired had the employer known of the falsification, the plaintiff suffers no legal damage by being fired.[51]

In *Bonger v. American Water Works*,[52] the plaintiff brought suit against her employer for sex discrimination and retaliation. After plaintiff's termination, the defendant learned that the plaintiff misrepresented on her resume that she had a college degree. Relying on *Summers*, the court dismissed the case and held that the plaintiff suffered no damages because had her employer known of the falsifications on her job application, it would have discharged her regardless of the discrimination.[53] The court stated that there are many situations in which an employer probably would not discharge an employee when it subsequently discovers that the employee committed resume fraud, despite the fact that the employee probably would not have been hired absent the resume fraud. In such situations, the court acknowledged that the employee would indeed suffer injury if discharged on the basis of discrimination.[54] However, in *Bonger*, the court held that this was not the case, both because the defendant maintained a written policy that dishonesty in the application process constituted grounds for termination, and because the defendant submitted affidavits stating that it would have discharged the plaintiff for her misrepresentations.

Similarly, in *Churchman v. Pinkerton's Inc.*,[55] a plaintiff's suit for sexual harassment was dismissed on summary judgment because the court found that the plaintiff sustained no injury as a result of her termination. In *Churchman*, the defendant learned,

[51] *Id.* at 304-05.
[52] 789 F. Supp. 1102 (D. Colo. 1992).
[53] *Id.* at 1106.
[54] *Id.*
[55] 756 F. Supp. 515 (D. Kan. 1991).

during discovery, that the plaintiff's job application contained an exorbitant number of lies and omissions. Specifically, the plaintiff had (1) omitted some of her past addresses; (2) stated that she had not been hospitalized during the previous five years for a mental condition, when, in fact, she had been hospitalized approximately six months earlier for attempting suicide; (3) stated that she had not used any narcotic drugs or illegal drugs, when, in fact, she had used speed, valium, and marijuana; (4) stated that she had never been terminated for cause, when, in fact, she had been terminated for cause twice before; and (5) in response to a question asking her to list all jobs held during the previous ten years, she listed five out of ten jobs, excluding, among others, the jobs from which she was fired for cause.[56] At the bottom of her application, the plaintiff also signed a statement that failure to answer all questions or making any misrepresentations on the application would serve as a basis for termination.[57] In her deposition, plaintiff stated that she made some of her omissions because disclosure would have been "kind of stupid on my part."[58] She explained that she lied about being terminated for cause because she thought to herself "how many people [are] going to hire somebody, especially a security firm, if they had been fired from another job."[59]

Relying on *Summers*, the court granted summary judgment and found that the omissions and misrepresentations were directly relevant to the hiring decision because they tended to show instability in the plaintiff's work life and her personal life.[60] In addition, plaintiff's deposition testimony indicated that she fully appreciated the significance of disclosing the facts and the adverse consequences that would have resulted had she done so.[61] Summary judgment was appropriate because "[p]laintiff [had] wholly failed to present any evidence to rebut the statements of [defendant's] representatives that plaintiff would have been terminated based upon the discovery of the material omissions and falsities."[62]

[56] *Id.* at 518.
[57] *Id.*
[58] *Id.* at 517-18.
[59] *Id.* at 518.
[60] Churchman v. Pinkerton's Inc., 756 F. Supp. 515, 521 (D. Kan. 1991).
[61] *Id.*
[62] *Id.*; *see also* Guzman v. United Airlines, No. 88-24-1-Z, 1990 U.S. Dist. LEXIS 9390, at *12 (D. Mass July 20, 1991). The court granted summary judgment based on the em-

In most courts that recognize it, the *Summers* defense should and does have limitations. In *Reed v. AMAX Co.*,[63] an employee brought a race-discrimination suit against his employer. After the plaintiff's termination and during discovery, the employer learned that the plaintiff had falsified his job application by stating that he had never been convicted of a felony.[64] Relying on *Summers*, the defendant moved for summary judgment, claiming that the plaintiff could have been fired based on the misrepresentations contained in his job application. Denying summary judgment, the Seventh Circuit held that the defendant's interpretation of *Summers* was too broad. According to the Seventh Circuit, *Summers* and analogous cases require proof that the employer *would* have fired the employee, not simply that the employer *could* have fired the employee.[65] The court added that the purpose of requiring such proof is "to prevent employers from avoiding Title VII liability by pointing to minor rule violations which may technically subject the employee to dismissal but would not, in fact, result in discharge."[66] As the *Reed* decision illustrates, the *Summers* defense

ployer's after-acquired evidence that the employee falsified the medical portion of the employment application. *Id.* The employer testified, without contradiction, that the falsification would have been grounds for terminating the employee and that the employee would never have been hired had the true medical condition been known. *Id. Guzman*, however, predates the effective date of the Americans with Disabilities Act and it is questionable as to whether the employer could have used the same medical evidence after the effective date of the Act. *Id.* For instance, in *Husienga v. Opus Corp.*, 494 N.W.2d 469 (Minn. 1992), an employer sought to avoid workers' compensation payments to an employee based on after-acquired evidence that the employee responded falsely to certain pre-employment questions about his medical history. *Id.* at 471. Applying Minnesota's Human Rights Act, the court rejected the employer's defense and held that the employer could only raise such a defense if the health related questions were job related. *Id.* at 473. Under the Americans with Disabilities Act, the employer is prohibited from asking such pre-employment medical history questions. *Id.*; *see also* Mathis v. Boeing Military Airplane Co., 719 F. Supp. 991, 993 (D. Kan. 1989) (granting summary judgment where plaintiff failed to reveal that (1) she had pleaded guilty to a felony, (2) had resigned from her former federal government job to avoid suspension, and (3) she had been terminated from three prior federal agencies for poor performance.).

63 971 F.2d 1295 (7th Cir. 1992).

64 *Id.* at 1298.

65 *Id.*

66 *Id.*; *see also* O'Driscoll v. Hercules Inc., 745 F. Supp. 656, 659 (D. Utah 1990), *aff'd*, 12 F.3d 176 (1994). The court held that the *Summers* holding does not allow an employer to comb through an employee's file after a discriminatory discharge "[t]o discover minor, trivial or technical infractions" and that the employee's misrepresentations of her age, her children's age, the year of her high school graduation and the fact that she had applied for a job with the defendant once before all fell within this category of infractions. *Id.* at 659; O'Day v. McDonnell Douglas Helicopter Co., 784 F. Supp. 1466, 1470 (D. Ariz. 1992) (in order to use after-acquired evidence to preclude employee's relief, employer must prove that had it known of employee's misconduct, employee would have been discharged immediately); Devoe v. Medi-Dyn, Inc., 782 F. Supp. 546, 552 (D. Kan. 1992) (denying summary judgment

will sometimes raise a genuine issue of material fact as to whether the employer would have taken the same action had it known of the after-acquired evidence at the time of its decision, thereby making summary judgment inappropriate. The case of *Punahele v. United Air Lines, Inc.*,[67] is illustrative of this point.

In *Punahele*, the employee brought suit for a discriminatory refusal to hire.[68] During litigation, United Air Lines ("United") learned that Punahele failed to disclose his tardiness record with his former employer and did not disclose that he had earlier been convicted of a felony.[69] United moved for summary judgment contending that, regardless of discrimination, it would not have hired Punahele had it known of the after-acquired information.[70] In support of this argument, United submitted the affidavit of its senior employment representative. According to the affidavit, United's standard operating procedure was to ask each applicant for his previous tardiness record before hiring.[71] If the applicant did not recall the information, then United would obtain it from an employment records service.[72] United's representative contended that since Punahele's attendance record was not requested from the records service, United must have asked Punahele for the information and he must have concealed the truth with his answer.[73]

According to Punahele, however, United never asked him for his tardiness record and, even if he had been asked, he would have told them that he could not recall it.[74] Punahele also claimed that had United known of his tardiness record, he still would have been hired. In large part, Punahele's tardiness record was formed during a strike against his former employer and, therefore, might not have been accurately recorded.[75] Also, Punahele had worked for three months as a temporary employee for United, during which time he compiled a perfect dependability rating and his at-

for employer who actually knew of alleged concealment by employee at time of firing but did not rely upon it as reason for terminating employment).

67 756 F. Supp. 487 (D. Colo. 1991).

68 *Id.* at 488.

69 *Id.* at 489.

70 *Id.*

71 *Id.* at 490-91.

72 *See* Punahele v. United Air Lines, Inc., 756 F. Supp. 487, 491 (D. Colo. 1991).

73 *Id.*

74 *Id.*

75 *Id.*

tendance was outstanding.[76] Finding genuine issues of material fact as to whether (1) United followed its standard operating procedure, and (2) whether United would have refused to hire Punahele even if it had followed its procedure, the court denied United's motion for summary judgment.[77]

2. The Cases Reducing or Limiting the Employee's Damage Recovery Based on After-Acquired Evidence

While the Tenth and Sixth Circuit decisions, such as *Summers*, *Bonger*, and *Milligan-Jensen* allow an employer to use after-acquired evidence to cut off damages entirely, other courts have refused to impose such a harsh sanction and, instead have chosen to reduce or limit the plaintiff's damages. In *Smith v. General Scanning, Inc.*,[78] the plaintiff sued his employer for discriminatory termination. After the plaintiff's termination, the defendant learned that plaintiff's resume contained certain falsifications and attempted to use it to justify the employee's termination.[79] The Seventh Circuit refused to admit the evidence on the issue of liability or on the issue of damages.[80] However, in a footnote, the court stated that, in some cases, the after-acquired evidence would be relevant for the purpose of determining damages.[81] For instance, "[i]t would hardly make sense to order [the plaintiff] reinstated to a job which he lied to get and from which he properly could have been discharged . . . . [T]he same would be true regarding any back pay accumulation *after* the fraud was discovered."[82]

Recently, the Seventh Circuit provided additional guidance on the relationship between after-acquired evidence and damages. In *Kristufek v. Hussmann Foodservice Co.*,[83] the plaintiff brought suit for a discriminatory termination based on age. After the initiation of the lawsuit, the defendant learned that the plaintiff had

[76] *Id.*

[77] Punahele v. United Air Lines, Inc. 756 F. Supp. 487, 491 (D. Colo. 1991); *see also* Rupley v. Rorer Pharmaceutical Corp., No. 90-C-5597, 1992 U.S. Dist. LEXIS 1779, at *18-19 (N.D. Ill. Feb. 19, 1992). The employer argued that it would have terminated the employee had it known that he had other outside employment. *Id.* However, the court rejected the employer's argument because there was evidence that his immediate supervisor was aware of the outside employment but did not fire him. *Id.*

[78] 876 F.2d 1315 (7th Cir. 1989).

[79] *Id.* at 1317.

[80] *Id.* at 1319-20.

[81] *Id.* at 1319 n.2.

[82] *Id.* (citation omitted).

[83] 985 F.2d 364 (7th Cir. 1993).

falsified his educational qualifications at the time of hiring. The district court held that Kristufek's fraudulent conduct barred him from any recovery.[84] The Seventh Circuit reversed.

Relying on *Smith v. General Scanning, Inc.*,[85] the Seventh Circuit stated, at the outset, that Kristufek's resume fraud had nothing to do with the issue of liability because it was not discovered until after the termination.[86] The court held:

> A discriminatory firing must be decided solely with respect to the known circumstances leading to the discharge. The deterring statutory penalty is for retaliatory firing, the character of which is not changed by some after discovered alternate reason for discharge which might have been used but was not.

Next, the Seventh Circuit explored the impact of the after-acquired evidence on damages. Relying on *Summers*,[87] the employer argued that Kristufek should not recover any damages based on the after-acquired evidence. The court, however, distinguished *Summers*. Many of the employee's falsifications, in *Summers*, were known to his employer at the time of the discharge. Summers was repeatedly warned that continued falsifications could result in dismissal. In *Kristufek*, however, the employee's one-time falsification was not known by his employer until after his discharge.[88] Additionally, the court found that Kristufek's falsification was not of a critical nature because the record demonstrated that although his falsely represented educational background would have been desirable, it was not a prerequisite for the job.[89] The court stated that "those qualifications were not so critical as to cancel out the statutory penalty for a discriminatory firing. Kristufek functioned well without those degrees."[90] Although the court held that the after-acquired evidence did not preclude Kristufek from recovering damages, it would be appropriate to limit his back pay award by cutting off his damages as of the date that the evidence was actually discovered.[91]

The Eleventh Circuit has also refused to allow the *Summers* de-

[84] *Id.* at 369.
[85] 876 F.2d 1315 (7th Cir. 1989).
[86] Kristufek v. Hussmann Foodservice Co., 985 F.2d 364, 370 (7th Cir. 1993).
[87] Summers v. State Farm Mut. Auto Ins. Co., 864 F.2d 700 (10th Cir. 1988).
[88] *See Kristufek*, 985 F.2d at 379.
[89] *Id.* at 370.
[90] *Id.*
[91] *Id.* at 371.

fense to serve as a complete bar to damages.[92] In *Wallace v. Dunn Construction Co.*,[93] the plaintiff brought suit alleging sexual harassment and violations of the Equal Pay Act. The defendant learned, during discovery, that the plaintiff had lied on her job application by stating that she had not been convicted of a crime.[94] Using this after-acquired evidence, the defendant moved for a partial summary judgment, based on *Summers*, claiming that the fraud would have served as a legitimate reason for discharge, even without unlawful motives. Acknowledging that the *Summers* defense was an issue of first impression in the Eleventh Circuit, the court, per Senior Circuit Judge Frank M. Johnson, Jr., rejected the defense and provided an in-depth and well-reasoned discussion.[95]

First, the court looked at the cases relied upon by *Summers* for the proposition that after-acquired evidence can be used to show that the plaintiff has suffered no injury and therefore is not entitled to damages. The court stated that *Summers* relied significantly on three cases, *Blalock v. Metals Trades, Inc.*,[96] *Smallwood v. United Air Lines, Inc.*,[97] and *Murnane v. American Air Lines*.[98] The court found these cases to be clearly distinguishable from the facts of *Summers*.[99] *Blalock* did not involve after-acquired evidence at all.[100] *Smallwood* and *Murnane* involved refusals to rehire that would have happened even without an illegal motivation because the employers proved that, in the next step in their hiring process, they would have uncovered the legitimate reason for not hiring the employee.[101] Thus, in *Smallwood* and *Murnane*, the employees suffered no injury "because, in fact, they never would have been hired even absent the discriminatory motive."[102]

The Eleventh Circuit next analyzed *Summers'* interpretation of the Supreme Court's decision in *Mount Healthy*. The Eleventh Circuit stated: "we agree with the *Summers* court that *Mount*

92 *See* Wallace v. Dunn Constr. Co., 968 F.2d 1174 (11th Cir. 1992).
93 968 F.2d 1174 (11th Cir. 1992).
94 *Id.* at 1177.
95 *Id.* at 1178-84.
96 775 F.2d 703 (6th Cir. 1985).
97 728 F.2d 614 (4th Cir.), *cert. denied*, 469 U.S. 832 (1984).
98 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982).
99 *See* Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1178 (11th Cir. 1992).
100 *Id.* at 1179.
101 *Id.*
102 *Id.*

Healthy provides important and persuasive guidance concerning after-acquired evidence; however, we take issue with the Tenth Circuit's interpretation of *Mount Healthy* and find that *Mount Healthy* and related principles actually subvert, rather than support the Tenth Circuit's rule."[103] Finding that the *Summers* decision unreasonably extended the *Mount Healthy* principles, the Eleventh Circuit stated that *Summers* ignored the lapse of time between the employment decision and the discovery of the legitimate reason for discharge.[104] In *Mount Healthy*, the legitimate reason for discharge was known and considered at the time of the decision to discharge. The Eleventh Circuit concluded that while *Mount Healthy* excuses all liability based on what actually would have happened, *Summers* goes one step further:

> [*Summers*] excuses all liability based on what *hypothetically* would have occurred absent the alleged discriminatory motive *assuming the employer had knowledge that it would not acquire until sometime during the litigation arising from the discharge*. In doing so, the *Summers* rule clashes with the *Mount Healthy* principle (adapted for use in statutory discrimination cases) that the plaintiff should be left in no worse a position than if she had not been a member of a protected class or engaged in protected opposition to an unlawful employment practice. The Tenth Circuit clearly placed Summers in a worse position than if he had not been a member of a protected class. According to the facts assumed by the Court, absent his age and his religion, Summers would have remained employed for at least some period of time after he was actually discharged. Nevertheless, the Tenth Circuit denied him any relief for that lost period of employment.[105]

Next, the Eleventh Circuit examined the Supreme Court's decision in *Price Waterhouse*, which was decided after *Summers*. The Eleventh Circuit held that *Price Waterhouse* clarified *Mount Healthy*'s role with respect to Title VII cases. The Eleventh Circuit noted that both the plurality and concurrences in *Price Waterhouse* confirmed that the *Mount Healthy* decision held that if the plaintiff in a mixed-motives case proves a prima facie case of discrimination, the burden shifts to the defendant to show that

[103] *Id.* at 1178-79.
[104] *See* Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1179 (11th Cir. 1992).
[105] *Id.* at 1179-80 (emphasis added) (citations omitted).

the same decision would actually have been made absent the discrimination.[106] Thus, according to the Eleventh Circuit, *Summers* improperly ignored the time lapse between the unlawful act and the discovery of a legitimate reason for discharge, thereby putting the plaintiff in a worse position than if he had not been a member of a protected class.[107]

The Eleventh Circuit also found the *Summers* decision to be "antithetical" to the principal purpose of Title VII.[108] The principal purpose of Title VII is "'to achieve equality of employment opportunity' by giving employers incentives 'to self examine and self evaluate their employment practices and to endeavor to eliminate, so far as possible,' employment discrimination."[109] With this goal in mind, the Eleventh Circuit concluded that the *Summers* defense does not encourage employers to eliminate discrimination, but rather, the defense encourages employers "to establish ludicrously low thresholds for 'legitimate' termination and to devote fewer resources to preventing discrimination because *Summers* gives them the option to escape all liability by rummaging through an unlawfully discharged employee's background for flaws and then manufactur[e] a legitimate reason for the discharge that fits the flaws in the employee's background."[110]

After rejecting the *Summers* approach, the Eleventh Circuit concluded that the proper role of after-acquired evidence is that it may be used to reduce or limit damages.[111] However, the court held that the employer should bear the burden of showing by a preponderance of the evidence whether and in what manner the after-acquired evidence would have altered the employment relationship.[112] The court stated that the application of this rule will vary on the facts of each case.[113] If the after-acquired evidence, in and of itself, would have caused the defendant to fire the plaintiff, then the court stated that it would be inappropriate to order rein-

106 *Id.* at 1180.

107 *Id.*

108 *Id.*

109 Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1179 (11th Cir. 1992) (quoting Albermarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975) and Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971)).

110 *See Wallace*, 968 F.2d at 1180.

111 *Id.* at 1181-82.

112 *Id.* at 1181 n.11.

113 *Id.*

statement or front pay.[114] With respect to an award of back pay, the court held that plaintiff's back pay period should not be prematurely cut off unless and until the defendant can prove that it would have discovered the after-acquired evidence before the end of the back pay period.[115] The court noted that an alternative approach could be to cut off the back pay award on the day that the defendant actually discovered the after-acquired evidence. However, the court rejected this approach because it overlooks the rule in *Mount Healthy* and *Price Waterhouse* that a plaintiff should be placed in no worse of a position than if she were not a member of a protected class or if she did not engage in protected conduct.[116]

The Eleventh Circuit's approach to after-acquired evidence has also been followed by a district court in the Third Circuit. In *Massey v. Trump's Castle Hotel & Casino*,[117] an employee sued his employer for discriminatory termination. The employee was allegedly terminated for economic and financial considerations. During litigation, the employer discovered that the employee had lied on his job application. Specifically, the employee had stated that he left a former job for personal reasons when, in fact, he was forced to leave due to claims of sexual harassment. The employee also failed to disclose that he had been forced to resign from a former job as a policeman because he lost his gun.[118] The employer argued that, even though the after-acquired evidence played no role in the employee's termination, the evidence precluded him from recovering any relief under his discriminatory discharge claim.

In ruling on the after-acquired evidence defense, the court noted

[114] *Id.* at 1181 (citing Milligan-Jensen v. Michigan Tech. Univ., 767 F. Supp. 1403 (D. Mich. 1991), *rev'd*, 975 F.2d 302 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 2991, *cert. dismissed*, 114 S. Ct. 22 (1993) (involving falsification of employment application)).

[115] Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1182 (11th Cir. 1992).

[116] *Id.* In a more recent decision, the Eleventh Circuit, again, rejected an employer's after-acquired evidence defense. In *Calloway v. Partners Nat'l Health Plans*, 986 F.2d 446 (11th Cir. 1993), an employer tried to avoid a wage discrimination suit based on after-acquired evidence that the employee misrepresented on her resume that she had a college degree. The Eleventh Circuit rejected the employer's "unclean hands" argument. Under the doctrine of unclean hands, the employer must show (1) that the employee's wrongdoing is directly related to the employee's claim asserted and (2) that the employer was injured by the wrongdoing. *Id.* at 447. The court held that the misrepresentation that she had a college degree was unrelated to her wage claim because her predecessor and successor did not have college degrees. *Id.* The court also found that the employer was not harmed by the employee's misrepresentation, especially where the employee was performing her job in a satisfactory manner at the time of discharge. *Id.* at 451.

[117] 828 F. Supp. 314 (D. N.J. 1993).

[118] *Id.* at 317.

that the issue was one of first impression in the Third Circuit. The court then discussed the various approaches used by other federal courts and concluded that the Eleventh Circuit's approach to after-acquired evidence was the most logical and equitable. The court held that the discriminatory discharge claim would not be barred by the after-acquired evidence, however, the evidence could preclude an award of front pay or reinstatement.[119] In reaching this conclusion, the court specifically rejected that Tenth Circuit's holding, in *Summers*, that, in an after-acquired evidence case, the employee suffers no injury as a result of the discriminatory discharge. The court stated:

> It is problematic at best to say that there has been no injury in the face of proven illegal conduct. The after-acquired evidence cases are not equivalent to the mixed motive cases upon which they rely. In a mixed motive case, the employer had more than one reason for its employment decision, and that decision would not have been changed if the illegal motives were removed. In the after-acquired evidence cases, however, the employment decision was based solely on illegal grounds. Absent those illegal motives, the employee would still be employed.[120]

The *Massey* court also agreed with the Eleventh Circuit's conclusion in *Wallace v. Dunn Construction Co.*, that allowing after-acquired evidence to serve as a complete bar to recovery is inconsistent with the "make whole" purposes of Title VII. The court stated that the after-acquired evidence defense "could cause employees who did something wrong in the past to quietly endure discriminatory treatment rather than complain, regardless of how long ago the misconduct occurred or its triviality."[121]

As to the impact that the after-acquired evidence should have on back pay, the *Massey* court followed the Eleventh Circuit's approach in *Wallace* and held that back pay should be available to the employee until the time of judgment. The court indicated that it would be unfair to cut off back pay as of the date that the em-

[119] *Id.* at 322.
[120] *Id.*
[121] *Id.* at 323. The defendant argued that allowing employees to recover damages in after-acquired evidence cases would encourage employees to lie on their resumes and job applications. *Id.* The court found it "preposterous that an employee would refrain from lying because she anticipates that she may be illegally discriminated against later and wants to preserve her rights." *Id.* at 322 n.10.

ployer actually learned of the misconduct because that date is tainted by the employee's attempt to vindicate its rights.[122]

Most recently, the National Labor Relations Board (the "NLRB") indicated that it is unwilling to allow after-acquired evidence to preclude an award of damages in cases arising under the National Labor Relations Act (the "NLRA"). In *ABF Freight Systems, Inc. v. NLRB*,[123] a company terminated an employee because he had engaged in conduct protected by the NLRA. The company told the employee that he was being terminated for being late without good cause, in violation of a new company policy. Attempting to avoid the termination, the employee lied about why he was late. The company found out that he was lying and terminated him for violating the tardiness policy. In response, the employee filed an unfair labor practice claim with the NLRB.

At a hearing before an administrative law judge, the employee, under oath, repeated his false excuse for being late to work. The judge found that he was lying and that, therefore, the employer fired him for good cause.[124] Reversing this ruling, the NLRB acknowledged that the employee lied to his employer and could have been fired for lying, however, the NLRB pointed out that the employee was not fired for lying; he was fired for tardiness.[125] There was "abundant evidence" in the record of antiunion animus by the employer towards the employee.[126] As a result, the NLRB found that the reason given for the employee's termination was pretextual and that the real reason was in retaliation for his having engaged in protected labor activities. Thus, despite the fact that the employee lied to his employer and committed perjury before the administrative law judge, the NLRB reinstated him to his position with back pay. The NLRB's decision was upheld on appeal and the employer appealed to the United States Supreme Court.

The Supreme Court granted certiorari on the issue of whether "an employee forfeit[s] the remedy of reinstatement with back pay after the administrative law judge finds that he purposefully testified falsely during the administrative hearing."[127] The Court

[122] Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314, 323-24 (D. N.J. 1993).
[123] 114 S. Ct. 835 (1993).
[124] *Id.* at 838.
[125] *Id.*
[126] *Id.*
[127] *Id.* at 839 n.8.

stated that since Congress delegated primary responsibility to the NLRB for making remedial decisions that will best effectuate the policies of the NLRA, great deference should be given to the NLRB's decision. The Court held that the NLRB did not abuse its discretion in awarding damages, even though the employee gave perjured testimony. The Court said that it could not "fault the Board's conclusion that [the employee's] reason for being late to work was ultimately irrelevant to whether antiunion animus actually motivated his discharge and that ordering effective relief in a case of this character promotes a vital public interest."[128]

The *ABF* decision discussed damage awards under the NLRA, not Title VII. However, the Supreme Court has held that the back pay provisions of Title VII were expressly modeled after the back pay provisions of the NLRA.[129]

B. *Standards for the Use of After-Acquired Evidence When Assessing Damages*

As the cases demonstrate, the courts do not have a uniform view on the effect of after-acquired evidence on damages. At one end of the spectrum, the result can be extremely harsh when a plaintiff, who has made out a prima facie case of discrimination, is dismissed on summary judgment based on evidence acquired after the employer's discriminatory act.[130] Such evidence obviously

[128] *ABF Freight Systems*, 114 S. Ct. at 840. In a concurring opinion, Justice Scalia, joined by Justice O'Connor, indicated his belief that the NLRB should have denied reinstatement based on the perjury. *Id.* Justice Scalia stated that the employee had been given adequate relief without the reinstatement. *Id.* at 842-43.

[129] *See* Albermarle Paper Co. v. Moody, 422 U.S. 405, 419-20 (1975).

[130] At least one district court has rejected the *Summers* principle because the remedy is too harsh. In *Benitez v. Portland General Electric*, 58 Fair Empl. Prac. Cas. (BNA) 1130 (D. Or. 1992), the employee brought suit for national origin discrimination. *Id.* at 1132. The employer, during discovery, learned that the employee failed to disclose on his employment application several shoplifting convictions. *Id.* at 1136. Relying on *Summers*, the employer moved for summary judgment arguing that the employee would never had been hired had the employer known of the convictions. *Id.* In support of the motion for summary judgment, the company's Human Resource Manager submitted an affidavit. *Id.* Additionally, the job application itself stated that misrepresentations would be grounds for termination. *Id.*

The court stated that the *Summers* principle had not been adopted by the Ninth Circuit Court of Appeals and that the majority of circuit courts had not addressed the *Summers* issue. *Id.* Furthermore, if the employment application stated that misrepresentations may be cause for the applicant's discharge, then the employer may have the right to terminate the employee; however, it does not automatically follow that just because the employee may now be subject to discharge his discrimination claim must be dismissed. *Id.* The district court held that "[i]n view of the absence of Ninth Circuit precedent, and the harshness of the result urged by the defendant, I decline to dismiss the discrimination claims on the basis of defendant's after acquired evidence." *Id.*

played no role in the employer's decision to take the adverse action. Thus, allowing such evidence to negate any damage recovery is rather harsh and serves to undermine the civil rights laws. One of the more effective ways of deterring discrimination is to assess damages against employers who have engaged in discrimination.[131] Additionally, under the remedial scheme of the federal discrimination laws, victims of discrimination should be compensated for their injuries.[132] Cases holding that after-acquired evidence may be used to cut off damages entirely, in essence, hold that an employee who, at some time in the past, made misrepresentations on his or her resume or job application or committed a wrongful act during the course of employment is not protected from discrimination, even if, at the time of the discriminatory conduct, the employee was performing satisfactorily.[133] To hold that such an employee sustains no injury, either financially or emotionally, as a result of discrimination is a fiction which cannot be justified.[134]

[131] *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 763 (1976).

[132] *See* Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975).

[133] Although these decisions often pay homage to the principle that after-acquired evidence is not to be considered on the issue of liability, the practical effect of the decisions is to preclude any finding of liability by dismissing the case on summary judgment. In so doing, these decisions have held, as a matter of law, that the employee either would not have been hired or would have been fired based on the after acquired evidence. This determination, however, more realistically presents a material question of fact, thereby making summary judgment inappropriate. The United States Supreme Court has held, when ruling on a motion for summary judgment, that a court must resolve all reasonable inferences in favor of the party defending the motion, or as is usually the case, the plaintiff. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970); *see also* Ramseur v. Chase Manhattan Bank, 865 F.2d 460, 465 (2d Cir. 1989); Eastway Constr. Corp. v. New York City, 762 F.2d 243, 249 (2d Cir. 1985), *cert. denied*, 484 U.S. 918 (1987).

[134] *See* Goodman v. Lukens Steel Co., 482 U.S. 656, 661 (1987) (discrimination "is a fundamental injury to the individual rights of a person"); Massey v. Trump's Castle Hotel & Casino, 828 F. Supp. 314 (D. N.J. 1993). The argument that a plaintiff, in an after-acquired evidence case, sustains no harm further weakens under the Civil Rights Act of 1991, which, unlike Title VII of the Civil Rights Act of 1964, allows plaintiffs to recover for emotional harm suffered as a result of the discrimination. A plaintiff whose case is dismissed on summary judgment under the "no injury" theory never has a chance to recover for this harm.

The Civil Rights Act of 1991 also provides that if a plaintiff can prove that a discriminatory factor played a role in the adverse action and the defendant can prove that the same action would have been taken even absent the discriminatory factor, the court may still grant declaratory or injunctive relief as well as attorney fees and costs. *See* 42 U.S.C. §§ 2000e-5(g)(2)(B)(i); *see also* Washington v. Lake Cty., 969 F.2d 250, 256 n.6 (7th Cir. 1992) (suggesting, in dicta, that using after-acquired evidence to cut off damages might be inconsistent with Civil Rights Act of 1991); Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1181 (2d Cir. 1992).

Finally, the argument that a plaintiff in an after-acquired evidence case sustains no injury as a result of the discrimination seems to be at odds with decisions interpreting other

Defendants argue that employees who make misrepresentations on their resume or job applications receive a windfall when they are awarded damages against an employer who arguably would not have hired them in the first place or who would have terminated them had the omissions or misrepresentations been disclosed. This argument has surface appeal, however, it weakens under closer scrutiny.

Allowing a defendant, who has engaged in discrimination, to use after-acquired evidence to preclude the plaintiff from obtaining any relief allows the defendant to gain a windfall from the discrimination.[135] In *Mount Healthy*, the Supreme Court stated that the constitutional principles at stake from plaintiff's exercise of his First Amendment rights are "sufficiently vindicated if [the] employee is placed in no worse a position than if he had not engaged in the conduct."[136] Consistent with this principle, Justice Sandra Day O'Connor, in her concurring opinion in *Price Waterhouse*, made clear that, in a mixed-motive analysis, the focus is on what actually would have happened absent the discriminatory motive. Justice O'Connor stated that an employer must "demonstrate that with the illegitimate factor removed from the calculus, sufficient business reasons *would have* induced it to take the same employment action. This evidentiary scheme essentially requires the employer to place the employee in the same position he or she would have occupied absent discrimination."[137]

Under these principles, had the defendant not engaged in the discriminatory conduct, the employee would not have had to file the lawsuit, the after-acquired evidence would not have been dis-

antidiscrimination laws. For instance, in the housing discrimination context, individuals who, without intending to rent or purchase a home or apartment, pose as renters or buyers for the purpose of collecting evidence of unlawful discrimination have standing to sue for relief based on the discriminatory treatment to which they are subjected. *See* Havens Realty Corp. v. Coleman, 455 U.S. 363, 374 (1982); *see also* Fair Employment Council of Greater Washington, Inc. v. BMC Mktg. Corp., 829 F. Supp. 402, 402 (D. D.C. 1993) (testers have standing to sue under Title VII); Watts v. Boyd Properties, Inc., 758 F.2d 1482, 1485 (11th Cir. 1985) (testers have standing under 42 U.S.C. § 1982); Meyers v. Pennypack Woods Home Ownership Assoc., 559 F.2d 894, 894 (3d Cir. 1977).

[135] *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975). Under Title VII of the Civil Rights Act of 1964, if there is a finding of liability, the plaintiff is presumed to be entitled to back pay. *Id.* In such a case, back pay should only be denied where such a denial will not "frustrate the central purposes of eradicating discrimination . . . and making persons whole from injuries suffered through past discrimination." *Id.*

[136] *See* Mount Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 285 (1977).

[137] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 276-77 (1989) (O'Connor, J., concurring) (emphasis added).

covered, and the plaintiff would still be working for the defendant.[138] Thus, when after-acquired evidence is used to preclude recovery, the plaintiff is clearly not placed in the same position in which he would have been absent the discrimination. This is especially true if, at the time of the discriminatory decision, the plaintiff was performing in a satisfactory manner.[139]

The middle ground approach to the application of after-acquired evidence on damages is that the evidence may be used to limit or reduce damages.[140] This approach represents a compromise between the employer and the employee. Under this approach, however, there is still uncertainty in determining how to limit or reduce the damages. The question to be answered is how should a court apply the compromise approach without randomly having to offset the plaintiff's damages.[141]

In *Proulx v. Citibank, N.A.*,[142] the plaintiff brought suit for discriminatory treatment and discriminatory discharge based on gender. The suit was based on the activities of one of the plaintiff's supervisors. The defendant argued that plaintiff imminently would have been fired for nondiscriminatory reasons because, in the past, the plaintiff was frequently late for work and had been warned about his tardiness. During the course of discovery, the plaintiff also admitted that he had lied about his work record on his job application.[143] Under defendant's established policies, the

[138] See Moodie v. Federal Reserve Bank of New York, 831 F. Supp. 333, 336 (S.D.N.Y. 1993) ("Allowing the use of after acquired evidence as a complete defense 'would have the perverse effect of providing a windfall to employers who, in the absence of their lawful act and the ensuing litigation would never have discovered' the wrongdoing." (quoting Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1182 (11th Cir. 1992))).

[139] Permitting the use of after-acquired evidence allows and encourages defendants to submit self-serving affidavits and testimony as to the actions that it would have taken had it known of the after-acquired evidence. This clearly works to the employer's benefit where, at the time of the discrimination, the plaintiff was performing satisfactorily and there was no indication that the employer would have discovered or even looked for the after acquired evidence. *See Price Waterhouse*, 490 U.S. at 252 n.14 (Brennan, J., plurality opinion). The suggestion "that the employer's own testimony as to the probable decision in the absence of discrimination is due special credence where the court has, contrary to the employer's testimony, found that an illegitimate factor played a part in the decision, is baffling." *Id.* at 252.

[140] *See* Revised Enforcement Guidance on Recent Developments in Disparate Treatment Theory, Equal Employment Opportunity Commission, Pol'y No. N915.002 (July 14, 1992). Following this compromise approach, the EEOC issued a policy statement which announced that it would not consider after-acquired evidence on the issue of liability, but would consider such evidence for the possible reduction of damages. *Id.*

[141] Generally the employer learns about after-acquired evidence during the discovery process. Thus, the date that the employer actually discovers the after-acquired evidence is tainted by the discrimination and the employee's efforts to vindicate his rights.

[142] 681 F. Supp. 199 (S.D.N.Y.), *aff'd without opinion*, 862 F.2d 304 (2d Cir. 1988).

[143] *Id.* at 202.

plaintiff was, therefore, a candidate for dismissal.[144] As a result, the defendant argued that the plaintiff's damages, if any, should be minimal. The court, however, found no reason to limit the plaintiff's damages based on the after-acquired evidence.[145] The court found that although the plaintiff had been warned two times in the past about his attendance problems, at least one warning came from the same supervisor who was the center of the plaintiff's difficulties.[146] With respect to the falsification of the job application, the court stated that there was no evidence that the falsification was about to be detected by the employer. As to this point, the court also found it significant that the plaintiff's most recent job evaluation was highly favorable. Thus, the court held that, given the evidence, the record failed to establish that the plaintiff would have been terminated, and if so, when.[147]

If after-acquired evidence is to be used to reduce damages, perhaps the *Proulx* analysis is the proper analysis to be used. This is a similar approach to the one used by the Eleventh Circuit in *Wallace v. Dunn Construction Co.*[148]

There will almost always be some speculation in estimating and offsetting damages. But courts have recognized that speculation has its place in estimating damages and that doubts should be resolved against the wrongdoer.[149] When a defendant attempts to assert an after-acquired evidence defense, it should have the burden of establishing first, that it would have learned of the after-acquired evidence; second, approximately when it would have discovered the information; and third, that it had consistently fired employees in the past when such information came to light.[150]

In a mixed-motive case, an employer could meet this burden by showing, for example, that it had a policy or practice of conducting

144 *Id.*

145 *Id.* at 203.

146 *Id.*

147 Proulx v. Citibank, N.A., 681 F. Supp. 199, 203 (S.D.N.Y.), *aff'd without opinion*, 862 F.2d 304 (2d Cir. 1988).

148 968 F.2d 1174, 1181-82 n.11 (1992).

149 *See* Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562-66 (1931); Olympia Equip. Leasing Co. v. Western Union Tel. Co., 797 F.2d 370, 383 (7th Cir.), *reh'g denied*, 480 U.S. 934 (1986); Trout v. Garrett, 780 F. Supp. 1396, 1420 n.57 (D.D.C. 1991) (in attempting to remedy employment discrimination, district court should err on side of relief rather than denial of relief because employer, as proven discriminator, should bear risk of error).

150 *See* Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1181-82 (11th Cir. 1992); Proulx v. Citibank, N.A., 681 F. Supp. 199 (S.D.N.Y.), *aff'd without opinion*, 862 F.2d 304 (2d Cir. 1988).

internal routine audits of its departments and that the evidence likely would have been discovered in the next audit.[151] Similarly, the defendant could demonstrate that, at the time of the discriminatory termination, there was already in progress an investigation or audit that would have detected the plaintiff's wrongdoing. The distinction between this approach and the approach used in *Wallace* is that under this approach, the employee's economic damages may go beyond the date of judgment if the employer cannot establish when it would have discovered the wrongdoing. The policy behind this standard should recognize that where the employee was performing in a satisfactory manner and there is no apparent reason that his misrepresentation or wrongdoing would have been detected, the employer should not be allowed to gain a windfall by cutting off damages based on evidence it acquired as a result of the plaintiff's lawsuit to redress the discrimination to which he was subjected.

CONCLUSION

The optimal approach to the use of after-acquired evidence is that it should have no effect on liability or damages, as it does not relate to the underlying acts of discrimination. However, if a compromise approach is to be used, allowing employers to produce after-acquired evidence to reduce damages, the compromise approach should require employers to make an affirmative showing to the trier of fact concerning how and approximately when the after-acquired evidence would have been discovered and that such evidence would have resulted in the employee's termination. If the employer makes this showing, damages could be cut off as of the date that the after-acquired evidence *would have* been discovered.

[151] The employer might be able to meet its burden if, for example, it could show that it had actually audited resumes in the past and dismissed employees with falsified information, or that it had dismissed employees when resume falsifications had otherwise surfaced.